

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CONTINENTAL GRAIN COMPANY,
PORT OF TACOMA, and JONES
WASHINGTON STEVEDORING COMPANY,

Appellants,

y.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCRB Nos. 85-78; 85-83
and 85-101

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal of two notices and orders of two civil penalties of \$1,000 each for allowing the emission of airborne particulate matter from a grain loading operation, came on for hearing before the Board at Lacey on August 15, 1985. Seated for and as the Board were Lawrence J. Faulk (presiding). Wick Dufford and Gayle Rothrock, have reviewed the record. Respondent agency elected a formal hearing, pursuant to RCW 43.21B.230 and WAC 371-08-155. Donna Woods, court reporter of Robert H. Lewis & Associates, officially

1 reported the proceedings.

2 Appellant Port of Tacoma was represented by Robert MacLeod, Chief
3 Engineer. Appellant Continental Grain was represented by attorney at
4 law Michael E. Feiler. Appellant Jones Stevedoring Company was
5 represented by operations manager, Douglas Sterns. Respondent agency
6 was represented by its legal counsel, Keith D. McGoffin.

7 Witnesses were sworn and testified. Exhibits were admitted and
8 examined. Argument was heard. From the testimony, evidence, and
9 contentions of the parties, the Board makes these

10 FINDINGS OF FACT

11 I

12 Respondent, pursuant to RCW 43.21B.260, has filed with the Board a
13 certified copy of its Regulations I and II and all amendments thereto
14 dated July 25, 1985. We take official notice of those regulations.

15 II

16 On February 7, 1985, in the afternoon while on routine patrol, an
17 inspector from PSAPCA observed fugitive dust emissions rising from
18 grain loading aboard a ship at Continental Grain's pier at #11
19 Schuster Parkway, Tacoma, Pierce County, Washington. The Continental
20 Grain facility in question is located within an area of Tacoma where
21 concentrations of airborne particulates fail to meet the national
22 ambient air quality standards designed to protect human health and
23 welfare (non attainment area).

24 III

25 The inspector proceeded to a view point at the southeast parking
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1 area of the grain elevator. Grain dust was observed rising from two
2 holds of the vessel Golden Phoenix. The emission was constant from
3 both holds for a twenty-two minute period of direct observation.
4 Opacity was not recorded.

5 IV

6 During the observation, the inspector took four photographs from
7 the forward and aft holds showing fugitive dust emissions escaping
8 from the grain loading of the ship.

9 The inspector contacted the plant manager for Continental Grain.
10 The manager indicated that he was aware of the dust and said part of
11 the problem was caused by the separation of a flex pipe on boom number
12 one's air system. The manager indicated to the inspector that the
13 problem in the foreward hold was simply that the hold is 97 feet deep
14 and the spout won't reach that far. Grain is dropped from the end of
15 the shipping gallery spout to the bottom of the hold forming a pad.
16 Until the pad builds to the spout's level, dust escapes. The
17 inspector boarded the vessel Golden Phoenix prior to leaving the
18 terminal and found its deck to be extremely dusty.

19 V

20 On February 8, 1985, the inspector issued field notice of
21 violation (No. 20498) for an infraction of the agency's Regulation I,
22 Section 9.15 for causing or allowing airborne particulate matter to be
23 emitted in sufficient quantities and of such characteristics and
24 duration as is or is likely to be, injurious to human health or which
25 unreasonably interferes with enjoyment of life and property.

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1 VI

2 On April 29, 1985, respondent agency issued a formal Notice and
3 Order of Civil Penalty No. 6265 of \$1,000 for the same asserted
4 violation. From this action, appellant Continental Grain appealed to
5 this Board on May 13, 1985, becoming our number PCHB 85-78. Appellant
6 Jones Stevedoring Company's appeal was received by the Board on May
7 17, 1985, and became our number PCHB 85-83. The Port of Tacoma was
8 joined as an additional appellant on June 4, 1985.

9 VII

10 On April 3, 1985, while on routine patrol in the morning, an
11 inspector from PSAPCA observed grain dust emissions from grain loading
12 aboard a ship at Continental Grain's pier at #11 Schuster Parkway in
13 Tacoma, Pierce County, Washington. The dust emissions were coming
14 from Continental Grain Company's shipping gallery spout number 2 while
15 it was loading grain into the hold of the vessel Beaver State.

16 VIII

17 On arrival at the grain terminal's east parking area, the
18 inspector saw that the dust was escaping from the end of spout number
19 2 which was the center spout. Spout number 1 was raised above the
20 ship's deck and was not in use. Spout number 3 was near deck level
21 and was not in use. The inspector observed that the normal fitting,
22 called a "bullet," at the end of spout number 2 had been removed. It
23 had been replaced with a rectangular chute which was not connected to
24 the air processing system.

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IX

During the observation, the inspector took two photographs and noted some tan dust emissions of about fifty percent opacity.

The inspector recorded tan dust opacities for forty-three minutes. At the end of the recording period, the inspector determined that fourteen and one-half minutes of the forty-three minute period had exceeded the twenty percent opacity standards of Regulation I, Section 9.03(b)(2). The inspector further observed that for sixteen and one-quarter minutes, visible emissions were created by the grain loading operation. The inspector determined that this was a violation of Section 9.15 of Regulation I and WAC 173-400-040(8). The inspector telephoned the assistant manager of Continental Grain Company and R.L. MacLeod, Chief Engineer of the Port of Tacoma, and informed them that notice of violation was being issued.

X

On April 3, 1985, the inspector issued field notice of violation (No. 20563) for an infraction of the agency's Regulation I, Section 9.03 for causing or allowing dust emissions from loading of grain with gallery spout number 2 into the hold of the vessel Beaver State for a period of more than three minutes in one hour greater than 20% opacity.

On May 22, 1985, respondent agency issued a formal Notice and Order of Civil Penalty No. 6271 of \$400 for the same asserted violation. From this action, appellant Continental Grain appealed to this Board on June 3, 1985, becoming our cause number PCHB 85-101.

XI

Appellant Continental Grain has had previous encounters with PSAPCA dating back to 1979 for allowing airborne particulate matter (dust) to escape from grain loading operations. There are indications that since the inception of operation of this grain elevator in 1975, Continental Grain has had 49 citations and \$8,150 has been paid in assessed penalties for circumstances relative to grain loading which they assert are beyond their control.

XII

Appellant Continental Grain testified that the grain loading elevator in Tacoma is a "standard" in the industry. The basic principal of the design is to stop the falling of grain at the discharge end of an aspirated vertical spout with a so-called "dea box" or "bullet" from which the grain then falls from a static position to the pile of grain in a vessel's hold no more than two to five feet. The grain, therefore, has little or no velocity to generate dust.

However, when loading extremely large bulk carrier vessels having deep draft, the loading spout and control system is unable to reach sufficiently close to the vessel bottom for maintenance of the necessary two to five feet from the grain, even with a spout extension. Consequently, grain must free fall 10 to 20 feet until cargo height has reached a point close to the spout discharge. During this early filling of deep holds, a small amount of dust escapes from the hatch opening. Since they cannot structurally or mechanically

1 alter the spout system to reach lower, they know of no alternative to
2 prevent this escape.

3 The loading of a tanker-type vessel presents a unique problem in
4 that tanker openings are extremely small circular openings in contrast
5 with the large open hatches of a bulk carrier. Some openings in the
6 vessel's wing tanks are often only 10"-12" in diameter, while their
7 loading spout is three feet in diameter. Hence, a spout can never be
8 actually placed inside the opening; as a result, all the grain must
9 free-fall to the bottom of the tanks from the deck opening with the
10 displaced air exiting with dust. The particulate emissions, while
11 exceeding opacity limits near the opening, are usually not wide spread
12 and are confined to a small area. Here again they know of no
13 acceptable method to prevent this.

14 The emissions associated with "tween-deck" vessels are a common
15 problem in all grain loading ports throughout the U.S. The very
16 nature of the vessel (1 or 2 lower decks) dictates the use of a
17 "spoon" or mechanical "trimmer." The National Cargo Bureau (NCB)
18 regulations require that all voids beneath these decks be filled for
19 stability of the vessel and to prevent shifting of the cargo during
20 transit. This can only be accomplished with trimmers which throw the
21 grain 15 to 20 feet in a trajectory to fill the voids. Obviously,
22 this procedure creates dust, some of which eventually exits through
23 the hatch openings. This is often the case even with so-called
24 "self-trimming" bulk carriers inasmuch as NCB surveillance has
25 dictated trimming fore and aft of the hatch openings. For these

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1 vessels, Continental asserts, there is no known effective method o.
2 containing these emissions during the trimming procedures.

3 In summary, Continental asserts that no adequate technology exists
4 for compliance with PSAPCA's regulations for visible emissions under
5 certain specific conditions, namely:

- 6 1. When starting the loading of a very large deep-draft vessel;
- 7 2. When loading a tanker-type vessel; and
- 8 3. When the configuration of the vessel requires the use of a
9 spoon or mechanical trimmer to satisfy National Cargo Bureau
10 regulations for vessel stability, including certain bulk carriers.

11 Continental initially requested this Board to issue a variance for
12 violations under these identified conditions. At hearing, this
13 request was refined to a defense asserting impossibility of compliance.

14 In the cases before us, the events of February 7 represent the
15 deep draft-vessel situation and the events of April 3 represent the
16 tanker-type vessel problem.

17 XIII

18 PSAPCA advocates the use of hatch tents in deep-draft vessel
19 loading and seals for tanker-type vessels. These techniques,
20 specified in Continental's original approval as an air contaminant
21 source, are believed by the agency to provide effective means for
22 controlling particulates in loading ships with grain.

23 Appellants questioned both the effectiveness and the safety of
24 these techniques. Continental is experimenting with USP grade mineral
25 oil to suppress the dust, but are unsure whether it is practical.

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1 Despite the problems experienced, we conclude that Continental has
2 not proven that compliance is utterly impossible. Obviously,
3 techniques acceptable to all parties have not been found. But the
4 experts even in their disagreement are discussing possible solutions.

5 XIV

6 The Port of Tacoma, as landowner, leases the grain loading
7 facilities to Continental. The Port does not supervise or direct
8 loading operations.

9 Jones Stevedoring Company performs services for Continental in
10 connection with loading ships. Jones, however, does not exercise
11 effective control over loading. They rent pollution control equipment
12 from Continental for loading jobs. They neither engineer nor maintain
13 such equipment. Rather they operate the system the grain elevator
14 provides.

15 XV

16 Any Conclusion of Law hereinafter determined to be a Finding of
17 Fact is hereby adopted as such.

18 From these Facts, the Board comes to these

19 CONCLUSIONS OF LAW

20 I

21 The Board has jurisdiction over these persons and these matters.
22 Chapters 43.21B and 70.94 RCW.

23 II

24 RCW 70.94.011 states, in pertinent part:

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2 It is declared to be the public policy of the state
3 to secure and maintain such levels of air quality
4 as will protect human health and safety and comply
5 with the requirements of the federal clean air act,
6 and, to the greatest degree practicable, prevent
7 injury to plant and animal life and property,
8 foster the comfort and convenience of its
9 inhabitants, promote the economic and social
10 development of the state, and facilitate the
11 enjoyment of the natural attractions of the state.

12
13 IV

14 Section 9.03 of Regulation I, entitled "Emissions of Air
15 Contaminant: Visual Standard," states in pertinent part:

16 (b) After July 1, 1975, it shall be unlawful
17 for any person to cause or allow the emission of
18 any air contaminant for a period or periods
19 aggregating more than three (3) minutes in any one
20 hour which is:

21 (1) Darker in shade than that designated as
22 No. 1 (20% density) on the Ringelmann Chart, as
23 published by the United States Bureau of Mines.

24 Section 9.15 of Regulation I, entitled "Airborne Particulate
25 Matter" states:

26 It shall be unlawful for any person to cause
27 or allow:

(a) particulate matter to be handled,
transported or stored, or

(b) a building or its appurtenances or a road
to be constructed, altered, repaired or demolished,
or

(c) untreated open areas located within a
private lot or roadway to be maintained in such a
manner that particulate matter is emitted in
sufficient quantities and of such characteristics
and duration as is, or is likely to be, injurious
to human health, plant or animal life, or property,
or which unreasonably interferes with enjoyment of
life and property.

V

We conclude that dust did escape from the grain loading operations on February 8, and April 3, 1985, and that these excursions violated the airborne particulate matter and opacity standards of PSAPCA. Though no harm was shown, significant particulate emissions in a non-attainment area are "likely to be injurious" as that term is used in the regulation. The ambient air standard which is not being attained in the area is itself a health and welfare standard.

VI

Under the circumstances present here, we conclude that neither the Port of Tacoma nor Jones Stevedoring Company did "cause or allow" the violations in question. For the purposes of the civil penalties at issue, we conclude that Continental is the legally responsible party.

VII

The Washington Clean Air Act, chapter 70.94 RCW, is a strict liability statute. Explanations do not operate to excuse violations of regulations adopted under its authority. Air contaminant sources are required to conform to such regulations.

VIII

RCW 70.94.181 provides a separate and distinct procedure for obtaining a variance from the regulations of an air pollution control agency. This procedure involves applying to the agency itself and, after an information-gathering hearing, receiving a ruling from the agency based on statutory criteria. The agency's ruling could then be appealed to this Board.

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1 This Board, however, does not have authority either to hear or
2 decide variance requests made to it in the first instance as a means
3 of defending against a violation and civil penalty.

4 Continental's "impossibility" defense raises the kind of question
5 the state Clean Air Act assigns to the variance process. One of the
6 statutory grounds for issuance of a variance is:

7 that there is no practicable means known or available
8 for the adequate prevention, abatement or control of
the pollution involved... RCW 70.94.181(2).

9 We conclude, therefore, that the issue raised in the "impossibility"
10 defense must under the statute be first presented to the agency in a
11 variance proceeding. we cannot grant a variance under the guise of
12 recognizing a particular legal defense.

13 IX

14 In determining whether a fine should be sustained against
15 Continental Grain, the surrounding facts and circumstances are
16 relevant. Factors bearing on reasonableness must be considered.
17 These include:

- 18 (a) the nature of the violation;
19 (b) the prior behavior of the violator; and
20 (c) actions taken to solve the problem.

21 X

22 Appellant Continental Grain in this case did cause a violation.
23 Appellant has a previous history of violating PSAPCA's Regulation I.
24 However, the company has made considerable effort to eliminate the
25 problem and continues to do so. There is no problem the vast majority

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1 of the time. No solution acceptable to all parties was made known to
2 the Board. Appellant might very well, therefore, consider the
3 desirability of requesting a variance from PSAPCA to cover the
4 circumstances identified in its testimony until an acceptable solution
5 is found.

6 XI

7 On the record before us, we conclude that assessing a penalty
8 against Continental Grain is justified. Weighing the facts of this
9 case and the testimony and behavior of appellants, we conclude that
10 the order set forth below is appropriate.

11 XII

12 Any Finding of Fact which is deemed a Conclusion of Law is hereby
13 adopted as such.

14 From these Conclusions of Law the Board enters this
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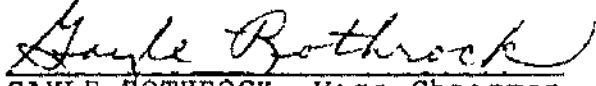
ORDER


The Notices and Orders of Civil Penalties Nos. 6265 and 6271 are affirmed as to Continental Grain Company. Said notices and order are reversed as to the Port of Tacoma and Jones Stevedoring Company.

DONE this 14th day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD

 10/11/85
LAWRENCE J. PAULK, Chairman


GAYLE ROTHROCK, Vice Chairman


WICK DUFFORD, Lawyer Member